

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NWDC RESISTANCE and COALITION OF  
ANTI-RACIST WHITES,

Plaintiffs,

v.

IMMIGRATION & CUSTOMS  
ENFORCEMENT, MATTHEW T. ALBENCE,  
in his official capacity as Acting Director of  
Immigration and Customs Enforcement; and  
CHAD F. WOLF, in his official capacity as  
Acting Secretary of Homeland Security,

Defendants.

No. 3:18-cv-05860-JLR

**RESPONSE TO ORDER TO SHOW  
CAUSE**

On October 26, 2021, and again on January 25, 2022, this Court stayed the proceedings so that the parties could attempt a settlement through mediation. The parties conducted the mediation on February 18, 2022, and it was unsuccessful. On March 18, 2022, the Court ordered counsel to show cause by March 25, 2022, why the Court should not lift the stay in this action. Dkt. 83. Pursuant to that Order, the parties provide their respective positions here.

**Plaintiffs' position.**

The Court should lift the stay. This case has been pending since October 23, 2018. The government has filed two, unsuccessful dispositive motions, Dkt. 30, 70, and the parties have engaged in some (but not all) written discovery and have taken no depositions. Plaintiffs served multiple requests for the production of documents in 2019 and 2020, but the government refused to fully comply with those requests. The parties were in the process of conferring regarding those discovery disputes when, on April 8, 2021, the Court granted in part the government's motion to stay for 90 days (i.e., until July 7, 2021), setting trial for May 9, 2022, Dkt. 75. Before the stay and then after, beginning in July 2021, the parties engaged in settlement discussions, with the government requesting a mediation. To accommodate this request, in the fall of 2021, Plaintiffs twice agreed to stay the case. Dkt. 77, 80. The mediation, held February 18, 2022, was unsuccessful.

Plaintiffs ask the Court to enter a revised scheduling order so that the parties may complete discovery and proceed to trial. Plaintiffs propose the following dates:

Event	Old Dates	New Dates
<b>BENCH TRIAL DATE</b>	May 16, 2022	March 6, 2023
Deadline for joining additional parties		June 1, 2022
Deadline for amending pleadings		June 1, 2022
Disclosure of expert testimony under FRCP	November 17, 2021	August 2, 2022
All motions related to discovery must be filed by	December 17, 2021	September 2, 2022

Discovery completed by	January 18, 2022	October 3, 2022
All dispositive motions and motions challenging	February 15, 2022	November 7, 2022
Settlement conference held no later than	March 17, 2022	December 5, 2022
All motions in limine must be filed by	April 4, 2022	January 30, 2023
Agreed pretrial order due	April 25, 2022	February 20, 2023
Deposition Designations must be submitted to the	April 27, 2022	February 22, 2023
Pretrial conference to be held at 2:00 PM on	May 2, 2022	February 20, 2023
Trial briefs and proposed findings of fact and	May 9, 2022	March 6, 2023

However, the government asks the Court to further delay discovery while the government files its third dispositive motion. This time, the government intends to argue that Plaintiffs' claims are moot because the government has issued a memorandum restating the government's official position that ICE should not retaliate against noncitizens for exercising their First Amendment rights.

This voluntary cessation theory does not render Plaintiffs' claims moot, and it does not provide a basis for further delaying discovery—especially where the evidence sought directly bears on the fact question of whether the government has complied with past and present guidance regarding retaliation. *See Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013). Dismissal is permitted only if “subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.* The government cannot make this showing here, as its argument is based on executive guidelines that it is free to alter at will and that therefore “cannot moot a claim.” *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). This is especially true where Plaintiffs allege—and intend to prove at trial—that the government has repeatedly violated past prohibitions on retaliation. Indeed, the very discovery the government seeks to evade is necessary to determine whether the government has complied with its new guidelines. Contrary to the government's assertions that mootness is a

question of law that may be resolved on a motion to dismiss, the government must present sufficient evidence to prove that it is “absolutely clear” it will not reoffend, and Plaintiffs must have the opportunity to obtain the evidence required to defend against that affirmative defense. *See, e.g., Bell*, 709 F.3d at 895, 898 (reversing summary judgment where, even after “extensive discovery,” the “record before [the court]” showed that the government “failed to meet [its] heavy burden”).

**Defendants’ position.**

Plaintiffs’ claims were rendered moot by affirmative actions taken through the issuance and adoption of new Guidelines for the Enforcement of Civil Immigration Law. These new Guidelines expressly prohibit the alleged conduct that forms the basis of Plaintiffs’ complaint. The new Guidelines state that “[a] noncitizen’s exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.” Thus, Plaintiffs’ claims are moot and their complaint should be dismissed with prejudice.

Defendants will file a motion to dismiss Plaintiffs’ complaint for lack of subject matter jurisdiction and to stay discovery. Defendants request that the Court set a briefing schedule for these motions to be filed within 60 days, where Defendants can address the standards for mootness and the burdens of proof to stay discovery while a motion to dismiss is pending as set forth in this Court’s decision in *Does v. Trump*, 328 F.Supp.3d 1185, 1195-96 (W.D.WA July 27, 2018)

The question of whether the new Guidelines render Plaintiffs’ claims moot is a question of law that can be decided on a motion to dismiss for lack of subject matter jurisdiction and does not require discovery. Defendants request that the Court first consider the government’s motion to dismiss and motion to stay discovery before setting a new case schedule and allowing time-consuming and expensive discovery, which is not needed to decide the legal issue. *See Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988).

1  
2 DATED this 21st day of March, 2022.

3 DAVIS WRIGHT TREMAINE LLP

4 By /s/ Ambika Kumar

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16  
17 Respectfully submitted,

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24 Attorney for Respondents

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the United States that, on the date set forth below, I caused a true and correct copy of the foregoing document to be filed with the Court using the CM/ECF system, which will cause all counsel of record to be served with the same.

DATED this 21st day of March, 2022.

/s/ Ambika Kumar

Ambika Kumar, WSBA #38237